IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

MONDAY, THE 13TH AUGUST 2007 / 22ND SRAVANA 1929

WP(C).No. 20918 of 2007(M)

PETITIONER:

M.HANEEFA, KUREEKATTIL HOUSE,
CHITTUR WARD, PATHANAMTHITTA.

BY ADV. SRI.S.ABDUL RAZZAK

RESPONDENTS:

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1. THE PATHANAMTHITTA MUNICIPALITY,
REPRESENTED BY ITS SECRETARY,
MUNICIPAL OFFICE, PATHANAMTHITTA, 689645.

2. THE MUNICIPAL ENGINEER,
MUNICIPAL OFFICE,
PATHANAMTHITTA, 689645.

3. V.K.VIJAYAKUMARI,
W/O MUHAMMED SALI, KOYIKKAL PURAYIDOM,
VALAMCHUZHI, PATHANAMTHITTA, 689645.

BY ADV. SRI.V.K.SUNIL
SRI.S.SHANAVAS KHAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 13/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1 PHOTOCOPY OF REGISTRATION CERTIFICATE ISSUED TO THE PETITIONER.

EXT.P2 PHOTOCOPY OF TENDER NOTICE NO.E1-5058/07 DTD. 25-5-07

EXT.P3 PHOTOCOPY OF 1ST RESPONDENT'S NOTICE DTD. 29-06-07

EXT.P4(A) TO P4(D)

PHOTOCOPY OF ESTIMATE FOR PETITIONER'S WORKS FOR THE FIRST RESPONDENT.

EXT.P5 PHOTOCOPY OF TENDER NOTICE FOR EXT.P4(A) PUBLIC WORKS EXECUTED BY THE PETITIONER.

EXT.P6 RELEASE LETTER IN RESPECT OF EXT.R1(A)-1

EXT.P7 RELEASE LETTER IN RESPECT OF EXT.R1(A) 2 TO 5

FIRST RESPONDENT'S EXHIBITS

EXT.R1(A) TRUE COPIES OF THE KISAN VIKAS PATRA AND NATIONAL SAVING CERTIFICATES PRODUCED BY THE PETITIONER AS EMD

EXT.R1(B) TRUE COPY OF THE LETTER SUBMITTED BY THE PETITIONER DTD. NIL BEFORE THE SECRETARY, PATHANAMTHITTA MUNICIPALITY ON 4-7-07

THIRD RESPONDENT'S EXHIBITS

EXT.R3(A) TRUE COPY OF THE CERTIFICATE DTD.30-05-2007 ISSUED BY THE EXECUTIVE ENGINEER, P.W.D. ROADS DIVISION, PATHANAMTHITTA

/True Copy/

PA to Judge.

K.M.JOSEPH, J.

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W.P.(C).No. 20918 OF 2007

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Dated this the 13th day of August, 2007

JUDGMENT

Petitioner has approached this court challenging Ext.P3. The respondent-Municipality called for tenders for executing the work of metaling of the yard of the New Municipal Bus stand under construction vide Ext.P2. Tenders were opened on 20/06/2007. Petitioner quoted the lowest rate at 23.1% below the estimate cost and the third respondent quoted the next higher rate of 17.6% below the estimate cost. The 10th item in Ext.P3 is in respect of the report of the Secretary on Ext.P2 to reject petitioner's lowest tender and to accept the next higher tender of the third respondent. The petitioner's tender was rejected on the basis of the remark by the second respondent namely the Municipal Engineer to the effect that petitioner has not pledged the earnest money with the secretary. According to the petitioner this view arises out of a mis-apprehension of the true scope of a pledge. A pledge is complete according to the

petitioner upon possession being handed over. Learned counsel for the petitioner would further contend that the matter is squarely covered by Rule 10(2) of the Kerala Municipality (Execution of Public Works and Purchase of Materials) Rules 1997. Rule 10(2) reads as follows:

> " *Along with the tender, there shall be submitted the earnest money specified in the tender notice, which may be in cash or in the form of National Savings Certificate or in the form of any bond specified by the Government."*

2. Counter affidavit is filed by respondents 1 and 3. I heard learned counsel for the parties. Learned counsel for the petitioner would submit that when the matter is squarely governed by the terms of the statutory provision, to contend that there is no pledge which appears to be the basis for rejection of the tender of the petitioner, it is misplaced and illegal. He would submit that petitioner has made the lowest tender and his tender is accompanied by the originals of National Savings Certificate and in such circumstances it is impermissible to reject the tender on the basis of the remark contained in Ext.P3 made by the second respondent.

3. Learned counsel for the first respondent would submit that this is a case where there is no valid tender. He further submits that there has to be a pledge and mere production of certificates would not suffice. He would contend that this is a case where having regard to the parameters within which the court will entertain a petition for judicial review, no case has been made by the petitioner. This is because as on the date when the decision was taken by the local body, the tender of the petitioner was accompanied by National Savings Certificate which contained an endorsement on the face of the documents which showed that the certificates are pledged with the State of Kerala. Therefore, he would submit that having regard to the purpose of earnest money deposit being taken in the form of Government security, it could not be said that the decision of the local body is in anyway illegal as the very purpose of the earnest money is to see that if the tenderer is not completing the work in terms of the contract, the local body is not put to loss and it can look to recompense from the proceeds of the Government security.

4. Learned counsel for the third respondent would also submit that there is no basis for interference. He would submit

that as on the date of the decision there is an endorsement on the face of the certificates showing that it stood endorsed in favour of the Government and therefore it cannot be treated as a valid tender of security in the form contemplated in sub rule 2 of Rule 10. Learned counsel for the first respondent relies on the decision reported in **Joyti Prakash Nande v. Muti Prakash Nande and others** (AIR 1918 Calcutta 947). That is a case under Section 172 read with section 176 of the Indian Contract Act 1872. Therein the court held as follows:

> " Government securities which are not specifically mentioned in Sec. 178, Contract Act, can not be pledged except by endorsement by the owner, even if they are already in the possession of the pledgee."

5. Apparently that is a decision which was rendered in the facts of that case. I do not think that this would advance the case of the Municipality. This is for the reason that unlike in the facts of that case, under Rule 10(2) already referred to, the statutory requirement is only that the tenderer should submit the earnest money either in cash or in the form of National Savings Certificate. Therefore the submission of the tender accompanied

by the National Savings Certificate is what the statute permits. In such circumstances it may not be open to the respondent to draw any support from the decision.

6. Learned counsel for the third respondent relied on the decision reported in **Directorate of Education and others v. Educomp Datamatics Ltd. and others** (2004(4) Supreme Court Cases 19). That is a case which delineates the court's power of interference under Article 226 with the terms of the tender and the Apex Court proceeded to hold that such terms are open for interference only if they are found to be arbitrary, discriminatory or biased. Learned counsel also relied on the decision reported in **Kadamakudi Panchayat H.M.Co-op. Society v. Kadamakudi Grama Panchayat.** (1996 (2) KLT Case No.70). There the court held that the highest bidder has no legal right that his offer must be accepted and in the absence of a legal right and corresponding legal duty, no mandamus can be issued.

7. Learned counsel for the petitioner relied on the decision of the Apex court in **Puravankara Projects Ltd. v. Hotel Venus International** (2007(2)KLT 943(SC) in support

of his contention.

8. Rule 10(2) is followed by sub rule 12 which is relevant and it reads as follows:

> *" Subject to sub-rule (14), the lowest tender shall be accepted for every public work.*
>
> *Provided that where the competent authority concerned is satisfied on the report of the Secretary endorsed on the basis of the remarks of the Municipal Engineer that it will not be desirable to accept such lowest tender, he may accept the next higher tender by rejecting the lowest tender, after recording the reasons relevant therefore."*

9. Rule 14 being relevant is extracted hereunder:

> *"Notwithstanding anything contained in sub-rule (11) for accepting tenders in excess of five per cent of the estimated amount the previous approval of the technical committee specified in sub-rule (1) of rule 5 shall be obtained."*

10. It is clear that the case of the petitioner does not fall under the terms of sub rule 14. In such circumstances it is clear that the lowest tenderer has a right to see that his tender is accepted subject ofcourse to his case not falling under the proviso to sub rule 12. Apparently the attempt of the

respondent in this case has been to bring it under the proviso to sub rule 12. This is as, it is based on the remark of the second respondent-Municipal Engineer that there is no pledge that it is decided to reject the tender. Therefore it is clear that unlike in the generality of cases, in a case covered by the Kerala Municipality (Execution of Public Works and Purchase of Materials) Rules 1997 there is a legal right vested with the lowest tenderer to have his tender accepted unless his case falls under the proviso to sub rule 12 or under sub rule 14. Here, admittedly petitioner has given the lowest tender at 23.1% below the estimate cost.

11. Learned counsel for the Municipality fairly submits that acceptance of the petitioner's tender would certainly reach a gain to the Municipality. Of course, he submits that the court is concerned with the legal issue. He also submits that the Municipality needs the work to be executed urgently.

12. I find merit in the contention of the petitioner that the rejection of his tender is illegal. Admittedly, there is a tender given by him. He has also produced the originals of the National Savings Certificate as contemplated in sub rule 2 of Rule 10. The

submission of the original certificates is significant for the reason that the endorsement made in favour of the Government is sought to be made use by the respondent. It may not be open to the respondent to air such an argument as the reason for the rejection of the tender is not that there is an endorsement in favour of the State, but that there is no pledge. Exts.P6 and P7 issued by the Superintending Engineer dated 30/05/2007 and 11-06-2007 would show that the documents which were endorsed in favour of the State has been released back. As already noted the ground for rejection is that there is no pledge. The concept of pledge is statutorily incorporated and dealt with in Sections 172 and 179 of the Indian Contract Act. The concept of pledge under the Act essentially is that there is transfer of physical or constructive possession of goods. It contemplates transfer of special rights to the pledgee to cause goods to be sold for realising the debt or the performance of a promise. Central to the concept of pledge is the inevitable need to transfer possession either actual or constructive. Ofcourse, in a case under the general law a question may arise as to whether a pledge is created in a different setting, which I do not think is

relevant to explore further in the facts of this case. This is because what is required is production of a National Savings Certificate or other bonds specified by the Government along with tender in a case where cash is not offered as a security. Here a tender is given under the Rules and the originals of National Savings Certificate is also produced. In fact I would think that it may not be difficult to draw an inference that the tenderer intended to create a pledge also.

In such circumstances I would think that particularly when local body is faced with considerable paucity of funds, it is in its interest also that it does not reject the tender of the petitioner on the ground stated in Ext.P3 . Accordingly, writ petition is allowed. Ext.P3 is quashed in so far as it relates to the decision thereon relating to the award of the work in question and there will be a direction to accept the tender given by the petitioner.

(K.M.JOSEPH, JUDGE)

sv.